

## EXHIBIT A

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

\* \* \* \* \*

SOUTHCOAST HOSPITALS \*  
GROUP, INC. \*

v. \*

MASSACHUSETTS DEPT. OF \*  
PUBLIC HEALTH, ET AL. \*

\* \* \* \* \*

Docket No.  
1584CV03139

TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE DOUGLAS WILKINS

Boston, Massachusetts  
Courtroom 314  
January 29, 2016

Proceedings recorded by court personnel  
Transcript prepared by  
Michelle Costantino, Approved Court Transcriber

APPEARANCES:

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1           And your argument is I shouldn't substitute my judgment  
2           for DPH is the kind of thing that I would ordinarily look at  
3           the record and I would say, well, did DPH have a reasonable  
4           ground to come to the conclusion they did.

5           MR. SINGAL: Right. Well, I think that your comment  
6           suggests to me that I have not properly articulated the  
7           argument on Count II, because it really is essentially an  
8           argument that the Count II fails to state a claim against  
9           Steward because there is no private right of action. There  
10          is no legal theory that -- the legal theory that they assert  
11          is not one that states a claim or gives them a legally  
12          cognizable claim based on the four corners of the complaint.

13          THE COURT: That's the cousin of standing argument,  
14          which I understand.

15          MR. SINGAL: Okay. And so that's our position, Your  
16          Honor.

17          THE COURT: Thank you very much.

18          Mr. Hammond, do you wish to be heard?

19          MR. HAMMOND: Your Honor, I'm obviously in an awkward  
20          position here today because the Department answered the  
21          complaint. We don't have a motion to dismiss pending.

22          THE COURT: Mm-hmm.

23          MR. HAMMOND: That being said, we did raise many of the  
24          same arguments that Steward is making today in our  
25          opposition to the preliminary injunction motion --

1 THE COURT: Mm-hmm.

2 MR. HAMMOND: -- and has affirmative defenses in our  
3 answer.

4 So, I guess I would suggest there's not much  
5 substantiative daylight between our position and Stewards',  
6 but there is obviously procedural daylight in the sense that  
7 they have moved for relief and we have not.

8 THE COURT: Sure. So, as you look at the case, if I  
9 denied the motion to dismiss, would your next step be to  
10 file an administrative record or do you think that's not  
11 this kind of case?

12 MR. HAMMOND: I don't believe it's this kind of case,  
13 Your Honor.

14 THE COURT: Okay.

15 MR. HAMMOND: In fact, we filed a substantiative  
16 paragraph-by-paragraph answer.

17 THE COURT: Mm-hmm.

18 MR. SINGAL: I think in answer to your last couple of  
19 questions to Mr. Singal, I think this isn't pleaded as a  
20 review of an administrative action complaint because it  
21 can't be.

22 THE COURT: Right.

23 MR. HAMMOND: And I would suggest Southcoast would not  
24 have standing to bring a 30A or certiorari-type complaint  
25 here because they were not a party to the licensing process

1 below, which is why they pleaded this as a declaratory  
2 judgment count. They're seeking a ruling as a matter of law  
3 that the agency cannot proceed this way. It cannot propound  
4 the rules that it propounded in the circular by anything  
5 short of a regulation. Or that even if the circular is  
6 valid, that somehow Steward was not entitled to benefit from  
7 it.

8 It's kind of an oblique way of getting at the same  
9 arguments one would make if one could bring an  
10 administrative action review case. But because this is  
11 pleaded as it must be as a declaratory judgment, there's  
12 really no record to file. All we can really proceed forward  
13 on is the facts that Southcoast alleges and any subsequent  
14 facts that come out in discovery, if we get that far.

15 I would suggest looking through the lens the other way.  
16 Again, the Department has no motion pending here today. If  
17 the Court were to allow the motion to dismiss, I think it  
18 would depend on the ground on which the Court dismissed what  
19 impact, if any, that would have on the Department.

20 I would certainly suggest if the Court found a lack of  
21 standing here, I think that's a binary question. Either  
22 Southcoast had standing to bring this complaint or it  
23 didn't.

24 So, I think the Department would certainly be a  
25 third-party beneficiary of a dismissal for want of standing

1 and I think claims against the Department would have to fall  
2 then as well.

3 If the Court were to dismiss on a failure to state a  
4 claim, then we have to look more specifically at the ground  
5 that the Court found and whether those apply to the counts  
6 against the Department as well.

7 But again, we have no motion pending here today, so I  
8 think I should probably limit myself accordingly.

9 THE COURT: Very good.

10 Southcoast? Mr. Bean.

11 MR. BEAN: Thank you, Your Honor. I'd like to sort of  
12 -- the procedural circumstances have changed since we filed  
13 our complaint. As Mr. Singal indicated, we were served with  
14 his reply this morning. I haven't had the chance to read  
15 it.

16 But circumstances have changed procedurally since we  
17 filed this action last October. And that's because a week  
18 or two ago the DPH did grant the authorization to transfer a  
19 license. And I'm going to get into that. Because this is  
20 not applying for a cardiac cath license at all. The ACO  
21 Exception Circular at issue in this case is extraordinary,  
22 as we'll hear. It talks about the transfer of an existing  
23 service license, and there was -- first of all, the statute  
24 does not allow the transfer of a license. There is no such  
25 thing as a service license. And the license at issue here

1 expired more than a year before -- it was surrendered and  
2 expired before it was purportedly transferred from Quincy  
3 Medical Center to St. Anne's.

4 But I'd like to get where we are procedurally. We  
5 filed this motion -- the complaint last October and we've  
6 been seeking to take discovery, working with the Attorney  
7 General's office. We've been stymied by Steward, by its  
8 filing a nonresponsive response to our request for  
9 documents.

10 We believe that -- we were planning to amend our  
11 complaint right before the hearing on the motion to dismiss.  
12 We got a call from your clerk yesterday to come in today if  
13 possible. We believe that discovery would shed light and  
14 allow us to file an amended complaint that would address  
15 several of the issues here.

16 One issue we obviously have to address is the change in  
17 circumstance because now there is a license that's been  
18 issued by DPH or the authorization to transfer a license.

19 We also believe that the discovery would also shed  
20 light on the standing issue. And as I said, we've been  
21 working with the state to get discovery from the state, and  
22 there's a deposition that we've been talking about.

23 THE COURT: So, explain that a little bit to me,  
24 because I would have thought standing depended upon your  
25 role in the industry and the statutory scheme.



1 MR. BEAN: There are several theories under which we  
2 can have standing, and that's one of them, Your Honor.  
3 There's another one that was -- this is a lot like the  
4 Everett Taxi case, unfortunately. And I don't know whether  
5 Your Honor had a chance to read the complaint, and I really  
6 don't want to get into too much detail, but Your Honor asked  
7 the question.

8 The secretary at EOHHS at the time this circular came  
9 about -- and this circular benefits Steward, Steward and  
10 Steward. Mr. Singal said a small class of hospitals. He's  
11 right. It's Steward.

12 It's referred to as "accountable care organizations,"  
13 but this was designed for the benefit of Steward. And if  
14 you look at some of the exhibits to the complaint, you'll  
15 see comments from DPH employees are saying this is for  
16 Steward, and how would this affect these other hospital  
17 groups?

18 At the time he will be -- before he was secretary of  
19 HHS, John Polanowicz was a Steward employee. After he left  
20 HHS, he became a Steward employee again. We believe that  
21 Mr. Polanowicz had an offer of employment or in discussions  
22 with Steward before this circular was issued, and we have  
23 concerns and we're seeking to do discovery that would make  
24 this case under a separate theory of standing under 268A.

25 And we have been stymied in our efforts to do that with

1       respect to Steward. The state has been cooperating,  
2       although it's taking longer than we'd like.

3               So, we think -- we think we have standing based on the  
4       economic harm solely; but there's this additional theory out  
5       there on which we would like to take discovery, which  
6       provides an additional theoretical basis for standing.

7               THE COURT: All right. But I mean you can't file a  
8       lawsuit to get discovery to prove that you have the right  
9       to --

10              MR. BEAN: No.

11              THE COURT: -- a file lawsuit, so --

12              MR. BEAN: Exactly right, Your Honor. And that's not  
13       our goal. Allegations under 268 are very serious.

14              THE COURT: Mm-hmm.

15              MR. BEAN: And we had -- we had stuff, we had material.  
16       We didn't want to go out and file it in the first instance,  
17       because it was so serious. So, we thought -- we think we  
18       have standing under the economic harm, and I'll walk through  
19       that in a minute. But I wanted to let the Court know --

20              THE COURT: Mm-hmm.

21              MR. BEAN: -- that there's additional.

22              Now, let me start with Indeck, because that is the key  
23       to the case. And I want to hand up to the Court, if I may,  
24       I've highlighted in the lower right Justice Cordy's  
25       conclusion.

1 Procedures Act? That's the actual controversy under the  
2 declaratory judgment section.

3 MR. HEIDT: Exception.

4 MR. BEAN: What did I say?

5 MR. HEIDT: Moratorium.

6 MR. BEAN: I misspoke. I meant the ACO Exception  
7 Circular, the one I handed up.

8 And in terms of Count II, yes, the context, the  
9 procedural context has changed, and I haven't had a chance  
10 to consider how we would amend the complaint in light of  
11 that. But this is something that happened a week ago. As I  
12 said, I hadn't expected to be here before Your Honor as  
13 quickly as we are.

14 THE COURT: And I didn't realize that we were in this  
15 procedural limbo here. I suppose one thing is if you want  
16 to amend the complaint, might save everybody some time if  
17 you do it before I devote the time to ruling on it, and then  
18 we can see whether Mr. Singal and Mr. Hammond think the  
19 issues are still the same.

20 MR. BEAN: I think that's an excellent idea. In the  
21 interim, however, Your Honor, we'd also like to be taking  
22 discovery. And so I think -- and I think what happened here  
23 in terms of --

24 THE COURT: Well, let me just interrupt. I understand  
25 that, but -- will the amended complaint affect standing at

1 all?

2 MR. BEAN: Yes.

3 THE COURT: Because it's going to have the 268A issue  
4 in it?

5 MR. BEAN: Assuming the facts pan out, yes. And this  
6 is Everett Taxi all over again.

7 THE COURT: It's Everett Taxi under 268A or it's  
8 Everett Taxi under -- because you've already argued it  
9 straight up under the regulatory scheme.

10 MR. BEAN: It's also under 268A, in addition to the  
11 regulatory scheme.

12 THE COURT: Because I mean 268A standing -- I won't say  
13 it's been cut back, but it's been recognized to be narrow,  
14 recently. But you still think you can meet it, huh?

15 MR. BEAN: Yes, Your Honor. Assuming the facts pan  
16 out. As I said, we don't make allegations under 268A  
17 lightly.

18 THE COURT: But I mean I guess I have serious concern  
19 about whether I should let you continue with a lawsuit in  
20 hopes that you come up with a theory of standing. So I have  
21 to think about that.

22 MR. BEAN: Well, as I said, if we had not been stymied  
23 in terms of discovery, we would have -- and if we had --

24 THE COURT: Right, but you don't have right to  
25 discovery unless you have standing, so you each disagree

1 about that issue. So, I can -- I don't want to say -- I  
2 mean, I understand that you're frustrated, but I can  
3 understand why -- why your opponents took the position that  
4 they did.

5 I mean, you need standing from Steward.

6 MR. BEAN: I'm sorry?

7 THE COURT: I'm sorry. You need discovery from  
8 Steward?

9 MR. BEAN: I need discovery from the state and from a  
10 former employee --

11 THE COURT: But the state's --

12 MR. BEAN: -- of DPH and from Steward, yes.

13 THE COURT: All right. The state's giving you what you  
14 need, but you don't think that's going to be enough. Huh?

15 MR. BEAN: I don't know. I haven't received it yet.  
16 One of the things we have been led to believe already,  
17 Steward has said publicly that Mr. Polanowicz recused  
18 himself from decisions involving the ACO Exception Circular,  
19 and that he notified the governor of job negotiations with  
20 Steward.

21 Mr. Hammond has informed me -- and you can correct me,  
22 Mr. Hammond, that they found no evidence of a letter to the  
23 governor advising him of the negotiations. There was no  
24 notification --

25 THE COURT: Would it be to the governor? What was his



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**COMMENTS:**

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Michelle Costantino

February 24, 2016

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